SUPREME COURT U.S.

No. 73-309

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In the Supreme Court of the United States

OCTOBER TERM, 1973

ANTHONY LAGATTUTA AND CARL LUICK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were found guilty of conspiring to commit mail fraud in violation of 18 U.S.C. 1341, 371. Petitioner Lagattuta was also found guilty of eleven substantive violations of 18 U.S.C. 1341, while petitioner Luick was found guilty of eight such violations.[1] Lagattuta was sentenced to concurrent five year prison terms on the conspiracy count and one of the substantive counts; sentence was suspended and he was given concurrent five year probation terms on the remaining

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[1] A co-defendant, Ronald Jones, was also convicted of the conspiracy and all the substantive counts. Another co-defendant, John Petrone, died prior to trial.

counts. Luick was fined $5000 and sentenced to concurrent two year prison terms on the conspiracy count and one of the substantive counts, ninety days of this sentence to be spent in prison and probation imposed for the remainder of the sentence. Sentence was suspended on the remaining counts and he was given five year concurrent probation terms. The court of appeals affirmed (Pet. App. A).

1. The evidence showed that co-defendants Jones and Petrone, and one Frank Teny assumed control of a financially troubled after hours club in 1969, it being the understanding of the parties that were the club not to prosper, insurance monies would be fraudulently sought by destroying the building (Tr. 45-48). Soon after, petitioner Lagattuta joined the group. The enterprise did not prosper and on March 23, 1970, the insurance on the building and its contents was increased from $55,000 to $160,000. Pursuant to the scheme, Lagattuta, Jones, and Teny met at the club in April of 1970, in order to determine the appropriate locations on the building's walls to punch air-holes to expedite the intended fire. The building did burn down on May 5, 1970. Witnesses testified that there was a heavy odor of gasoline in the air about the scene. An individual matching Lagattuta's description was seen fleeing the building shortly before the fire in a light colored automobile. Lagattuta was shown to have been registered at a nearby hotel on the night of the fire, to have been driving a light colored Buick, and to have been absent from the hotel room during the early morning hours when the fire occurred (Tr. 462-463; 472; 482; 492-500).

After the fire, petitioner Luick and Jones gathered fraudulent documents purporting to reflect the sale of merchandise or the renting of services to the club, when in fact no such merchandise had been sold or services rendered.

These were assembled by Luick, who was a public adjuster and given to a fire insurance adjuster representing the insurance company (Tr. 260, 263; 306-311; 324-335; 337-347). Luick also drew up and mailed to the insurance company a sworn statement of proof of loss as executed by the partners of the club (Tr. 272). It was also shown that Luick had referred to the fire as "Jewish lightning." (Tr. 183).

2. Much of the government's evidence rested upon the testimony of Frank Teny, who agreed to testify for the government in return for a grant of immunity. When Teny took the stand, he was asked a few innocuous questions to which he responded by invoking the Fifth Amendment privilege (Tr. 31-32). Thereupon, in open court, the government attorney requested the court to grant him immunity; this was done and the procedure was explained to the jury which was instructed that no inference from the grant should be drawn. Teny then fully testified and was subject to thorough cross-examination. Petitioners contend that this open court procedure on the immunity issue was error in that it prejudiced the jury. But this Court's decision in *Giglio* v. *United States,* 405 U.S. 150, required that the jury be apprised of the basis for Mr. Teny's testimony. That the jury learned of the motive for Teny's testimony by actually witnessing the grant of immunity is immaterial here for the record in no way supports petitioners' contention that the proceeding was prejudicial. Indeed, as the court of appeals observed, if anything, this procedure was helpful to the defense since it highlighted the question of Teny's credibility (Tr. 31-37).

3. Petitioners next claim error in the denial of their motions for a new trial which were based upon a newspaper article, published six months after their convictions, stating that following Teny's testimony he had been pro-

vided with a new identity and job in California in order to protect him from retaliation. Teny had testified that the government had indicated before trial that no commitments of assistance could be made. There is no merit to this claim of error for as the court below noted, this alleged new evidence related solely to Teny's credibility which had been thoroughly explored during the trial and as such was cumulative. As indicated above, the jury was fully aware that Teny had cooperated with the government in order to secure a grant of immunity from prosecution. Similarly, while Teny stated that his testimony was true, the defense successfully revealed during cross-examination the fact that Teny had previously been convicted of sodomy and rape (Tr. 103-104, 127); that in previous discussions with government investigators he had changed his story occasionally (Tr. 73-76); that he had earlier attempted to sell his testimony to the government (Tr. 82); that he had successfully secured the help of the government in straightening out a matter with the local police (Tr. 123-126); and that Petrone had once thrown him out of the club for stealing current receipts (Tr. 86). In light of this thorough examination of Teny's credibility, even had the jury learned that the government would later provide him with a new identity in a new community, it would not "in any reasonable likelihood have affected the judgment of the jury * * *." *Giglio, supra,* 405 U.S. at 154.[2]

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[2] We are advised by the United States Attorney who tried this case that Teny was correct in stating that no promise other than the grant of immunity had been made to him prior to his testimony; aside from that promise, the authorities merely indicated that they would do their best to insure his safety. The request of the United States Attorney to the Department of Justice Strike Force headquarters in Washington for permission to provide Teny with a new identity was not made until after the trial.

4. Petitioners contend that the government was obligated to prove, with respect to the conspiracy charge, that petitioners entertained a specific intent to use the mails to defraud as opposed to a mere demonstration of the use of the mails which would be sufficient to support conviction for a substantive violation.[3] However, as the opinion of the district court (Pet. App. 3a) indicated, the trial court did specifically instruct the jury that they must find as part of the conspiracy that it was contemplated "that the conspirators would place and cause to be placed in the post office and authorized depositories for mail matter, matters and things to be sent and delivered by the postal service" (Tr. 605). The jury's guilty verdict, pursuant to this instruction, was, as found by the court of appeals, supported by the evidence (Pet. App. 9a). In any event, because petitioners were given concurrent sentences on the conspiracy and substantive violations of §1341, this Court need not review contentions concerning the conspiracy counts. See *Benton* v. *Maryland,* 395 U.S. 784; *Barnes* v. *United States,* No. 72-5443, decided June 18, 1973.

5. Petitioners contend that the government failed to prove the substance of part of the scheme alleged in the indictment, namely that Lagattuta had participated in procuring the destruction of the club and further that the evidence with respect to petitioner Luick was insufficient to connect him with the conspiracy because it was sup-

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[3] The traditional rule that proof of *scienter, i.e.,* specific knowledge of the federal nature of a particular offense, is necessary to support a conspiracy conviction, as opposed to a substantive conviction, is not necessarily the favored view. See the discussion of this matter in *United States* v. *Alsondo, et al.* (Nos. 73-1297, 73-1466 and 73-1467, C.A. 2, decided July 13, 1973).

posedly not sufficient to prove that he knew the cause of the fire. As the discussion of the facts of this case indicates (*supra*, pp. 2-3), there was ample evidence adduced at trial to demonstrate, and for the jury to find, that Lagattuta was instrumental in procuring the destruction of the local club by arson. As to Luick, his association with Jones and Lagattuta in procuring false invoices as to the contents of the club and his reference to "Jewish lightning" strongly support the inference that he was aware of the cause of the fire.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[4] Petitioners' contention that the trial court erred in refusing to charge the jury on their particular theory of defense is frivolous because the actual instructions given were substantially the same as those claimed to have been wrongly denied. Petitioners state "that the Court should tell a Jury what was necessary to find an intentional set (sic) fire that was either set by these defendants or caused to be set by these defendants" (Pet. 22). The actual instruction given by the court was as follows (*ibid.*):

> Defendants contended there is absolutely no proof that they knew of the origin of the fire.
>
> Now, if you find that any of them did not procure the fire or know that it had been procured by someone else or of its origin as alleged in the Indictment, then the Government would have failed to prove the allegations as to that individual and that defendant should be found not guilty.